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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Audrey Davis, an individual,

Plaintiff,

v.

Rhondie Voorhees, personally and as
Dean of Students at Embry-Riddle Aeronautical
University; The Embry-Riddle Aeronautical
University Board Of Trustees; Embry-
Riddle Aeronautical University; and Tyler
Smith, an individual,

Defendants.

Rhondie Voorhees, an individual

Counterclaimant,

v.

Audrey Davis, an individual,

Counterdefendant.

NO. 3:21-cv-08249-DLR

**DEFENDANT RHONDIE
VOORHEES’S MOTION FOR
JUDGMENT ON THE
PLEADINGS AS TO COUNT III**

Defendant/Counterclaimant Rhondie Voorhees (“Dr. Voorhees”), by and through undersigned counsel, respectfully requests that the Court enter judgment dismissing with

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1 prejudice the Servicemembers Civil Relief Act (“SCRA”) claim asserted by Plaintiff
2 Audrey Davis (“Davis”). As a matter of law, Davis could not have been a “servicemember”
3 on July 8, 2021 under 50 U.S.C.A. § 3911 based on the plain language of the statute and/or
4 the underlying Army Senior Reserve Officers’ Training Corps (“ROTC”) contract. Davis’s
5 inability to establish this requirement is fatal to her claim, and Dr. Voorhees is entitled to
6 judgment as a matter of law.

7 Additionally, independent of the Court’s legal conclusion regarding the
8 “servicemember” issue, Dr. Voorhees is entitled to judgment as a matter of law because the
9 applicable SCRA provisions only apply to default judgments, not the entry of default. Dr.
10 Voorhees’s Motion is supported by the following Memorandum of Points and Authorities,
11 and all filings in this matter, which are all hereby incorporated by reference.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. RELEVANT FACTS; INTRODUCTION**

14 Dr. Voorhees is the Dean of Students at Embry-Riddle Aeronautical University in
15 Prescott, Arizona (“ERAU”). (*See* First Amended Complaint (“FAC”), ¶ 21 [Doc. 49]). In
16 2019, while a student at ERAU, Davis filed a complaint with ERAU under Title IX of the
17 Education Amendments of 1972 (“Title IX”), 20 U.S.C. §1681 et seq. (*Id.* at ¶¶ 8-10).
18 Davis was displeased with how ERAU investigated the Title IX complaint and/or its
19 findings. (*Id.* at ¶ 15). In September of 2020, Davis met with Dr. Voorhees regarding
20 Davis’s concerns. (*Id.* at ¶ 21).

21 On or about February 15, 2021, Davis published several false and defamatory
22 statements on Change.org (the “Petition”). (*See id.* at ¶ 32). In May of 2021, Dr. Voorhees
23 filed a defamation lawsuit in Yavapai County Superior Court (the “Defamation Lawsuit”).
24 (*Id.* at ¶ 47). On June 7, 2021, Davis was personally served with the Defamation Lawsuit at
25 her mother’s residence. (*Id.* at Ex. 3, ¶ 2 [Doc. 49-3]). After Davis failed to file any answer
26 or response, Dr. Voorhees sought an entry of default from the court. (*Id.*)
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1 Although default may (arguably) have been entered, no default judgment was ever
2 entered. (*See id.* at ¶¶ 88-89; Answer to FAC, ¶¶ 50, 81 [Doc. 50]). In fact, Dr. Voorhees
3 voluntarily dismissed the Defamation Lawsuit without prejudice, rendering any entry of
4 default null and void. *See* Minute Entry, attached hereto as **Exhibit 1**.

5 Davis’s SCRA claim is based on the allegation that she was a “servicemember” who
6 was on “*active duty*” at the time that Dr. Voorhees sought an entry in the Defamation Case.
7 (FAC, ¶¶ 47-52, 81-82 [Doc. 49]). However, at the time, Davis was a fulltime student at
8 ERAU who was enrolled in ROTC and participating in a training exercise. (*See id.* at ¶ 82).

9 The underlying ROTC Contract upon which Davis’s SCRA claim is based states, in
10 pertinent part, as follows:
11

12 As a condition for membership in the Army ROTC Program, I agree
13 to enlist in the Reserve Component of the United States Army. . . .

14 I agree to enroll in the necessary courses and successfully complete,
15 within the prescribed time, the requirements for the degree in the academic
16 major stated above. I agree to remain enrolled in and successfully complete
17 the ROTC program, including LDAC and all training as prescribed by the
18 Secretary of the Army or his/her designee, as a prerequisite for
19 commissioning. . . .

20 I agree to remain a *full-time student in good standing at the*
21 *educational institution named above until I receive my degree*. A full-time
22 student is defined as one enrolled in sufficient academic courses to obtain
23 sophomore, junior, and senior academic status at the end of each
24 appropriate one-academic-year increment for the duration of the
25 scholarship. This includes the required Army ROTC classes, which may be
26 part of or in addition to those courses required for my degree.

27 ***

28 I understand and agree that I will incur **an active duty and/or
reimbursement obligation after the first day of my MS II year
(sophomore year)** if I am a three-, four- or five-year scholarship recipient;
after the first day of my MS III year (junior year) if I am a two-year
scholarship recipient or after the first day of my MS IV year (senior year) if
I am a one-year or less scholarship recipient.

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4. CADET AGREEMENTS UPON PROGRAM COMPLETION.
Upon completion of all requirements for appointment, to include medical qualification, all prescribed military science courses, LDAC and any other training . . . I agree to . . . complete the following requirements:

a. ACCEPTANCE OF APPOINTMENT. I agree to accept an appointment, if offered, as a commissioned officer in the USAR or ARNGUS, in accordance with governing Army regulations. *I understand that upon appointment, I will incur a total military service obligation not to exceed eight (8) years and cannot resign such appointment before completion*

5. TERMS OF DISENROLLMENT. I understand and agree that once I become obligated and I am disenrolled from the ROTC program for breach of contractual terms or any other disenrollment criteria . . . the Secretary of the Army or his or her designee, **may order me to active duty as an enlisted soldier, if I am qualified, for a period of not more than four (4) years if I fail to complete the ROTC program.** . . . If I am offered the opportunity to repay my advanced educational assistance *in lieu of being ordered to active duty*, I will be required to reimburse the United States government through repayment of an amount of money, plus interest, equal to the entire amount of financial assistance (to include tuition, educational fees, books, laboratory expenses, and supplies), paid by the United States for my advanced education from the commencement of this contractual agreement to the date of my disenrollment or refusal to accept a commission. . . .

ORDER TO ACTIVE DUTY IN THE EVENT OF A WAR. I understand that either as an enlisted member or as a commissioned officer . . . I may be ordered to active duty without my consent in the event of a war, a national emergency declared by Congress or the President, an order of the Selected Reserve to active duty authorized by the President, and as otherwise authorized by law, such call to active duty could be for the duration of a war or any period of time authorized by law.

See Contract, attached hereto as **Exhibit 2**.

Davis was not in military service while participating in the ROTC program at ERAU. Her military service obligation – if any – was to begin after she graduated from

1 ERAU.

2 **II. LEGAL STANDARD**

3 A motion brought under Rule 12(c) is “functionally identical” to one brought
4 pursuant to Rule 12(b), and “the same standard of review applicable to a Rule 12(b) motion
5 applies to its Rule 12(c) analog.” *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192
6 (9th Cir. 1989). “Judgment on the pleadings is proper when the moving party clearly
7 establishes on the face of the pleadings that no material issue of fact remains to be resolved
8 and that it is entitled to judgment as a matter of law.” *Hal Roach Studios, Inc. v. Richard*
9 *Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989). A court must not consider
10 matters beyond the pleadings as such a proceeding must be treated as a motion for
11 summary judgment. *Id.*

12 However, under the incorporation by reference doctrine, the Court may consider in a
13 motion to dismiss any documents referenced in the complaint or on which the complaint
14 necessarily relies. *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1159-60 (9th Cir.
15 2012); *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999–1002 (9th Cir. 2018) (“A
16 plaintiff incorporates a document by reference where the complaint “refers extensively to
17 the document or the document forms the basis of the plaintiff’s claim.” ”). “Specifically,
18 courts may take into account ‘documents whose contents are alleged in a complaint and
19 whose authenticity no party questions, but which are not physically attached to the
20 [plaintiff’s] pleading.’ ” *Davis*, 691 F.3d at 1160 (quoting *Knieval v. ESPN*, 393 F.3d 1068,
21 1076 (9th Cir. 2005)). Additionally, “A court may take judicial notice of ‘matters of public
22 record’ without converting a motion to dismiss into a motion for summary judgment.” *Lee*
23 *v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

24 **III. ARGUMENT**

25 **a. Plaintiff was not a “servicemember.”**

26 The SCRA protects active-duty members of the United States military from certain
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1 obligations during the period which they are engaged in active service. *See* 50 U.S.C. §
 2 3901, et seq. A servicemember is a “member of the uniformed services, as that term is
 3 defined in section 101(a)(5) of title 10, United States Code.” 50 U.S.C. 3911(1). This
 4 includes the armed forces. *See* 10 U.S.C. § 101(a)(5). However, the servicemember must
 5 be engaged in fulltime active military service.

6 “The term ‘military service’ means— (A) in the case of a servicemember who is a
 7 member of the Army, Navy, Air Force, Marine Corps, or Coast Guard— (i) active duty, as
 8 defined in section 101(d)(1) of title 10” 50 U.S.C. § 3911.

9
 10 The term “active duty” means *full-time duty in the active military service*
 11 of the United States. Such term includes full-time training duty, annual
 12 training duty, and attendance, *while in the active military service*, at a
 13 school designated as a service school by law or by the Secretary of the
 14 military department concerned. Such term does not include full-time
 15 National Guard duty.

16 10 U.S.C. § 101(d)(1) (emphasis added).¹

17 Here, based on the plain language of the statute alone, it is evident that Davis could
 18 not have been a “servicemember” on “active duty” while she was participating in a training
 19 exercise as an ROTC cadet. Davis was a fulltime student who agreed to enlist in the
 20 Reserve Component of the Army and could be ordered to active duty as an enlisted soldier
 21 after graduation or disenrolled from the ROTC program. *See* Contract, Exhibit 2. The
 22 Contract specifically required Davis to remain a fulltime student. As a matter of law, Davis
 23 cannot be deemed to have been on “active duty” as fulltime servicemember at the time she
 24

25 ¹ It should be noted that a few courts have held ROTC cadets to be servicemembers but
 26 only for purposes of the Veterans Benefits Act, the *Feres* doctrine, and The Federal Tort
 27 Claims Act. *See Morse v. West*, 975 F. Supp. 1379, 1381 (D. Colo. 1997) (reviewing
 28 cases). It should also be noted that there are various administrative regulations in place that
 pertain exclusively to medical benefits depending on duty type and the like. *See* 38 CFR §
 17.31, et seq.

1 was a fulltime student participating in ROTC training. *See United States v. You Lo Chen*,
2 170 F.2d 307, 308–10 (1st Cir. 1948) (ROTC cadet having not been commissioned to
3 serve, “[h]is civilian statu[us] remained unchanged.”). Accordingly, the Court must enter
4 judgment in favor of Dr. Voorhees on Davis’s SCRA claim.

5 **b. The applicable SCRA provisions only apply to default judgments.**

6 Davis’s SCRA claim is based on 50 U.S.C. § 3931, which is titled “Protection of
7 servicemembers against default *judgments*.” 50 U.S.C. § 3931 (emphasis added). Section
8 (b) of the statute states that, “[i]n any action or proceeding covered by this section, the
9 court, before *entering judgment* for the plaintiff, shall require the plaintiff to file with the
10 court an affidavit” *Id.* at § 3931(b) (emphasis added). Entering a default is distinct
11 from entering a default judgment. *See Fed. R. Civ. P. 55; see also Ariz. R. Civ. P. 55.* And
12 the SCRA's affidavit requirement only applies when a plaintiff seeks an entry of default
13 judgment, not an entry of default. *See U.S. v. Topeka Livestock Auction, Inc.*, 392 F. Supp.
14 944, 950 (N.D. Ind. 1975) (finding that the SCRA’s affidavit requirement “applies only to
15 default judgments.”).

16 Here, no default judgment was ever sought or entered in the Defamation Case. As
17 evidenced by the Affidavit at issue, Dr. Voorhees only requested the entry of default. (*See*
18 *FAC*, Ex. 3 [Doc. 49-3]). Moreover, Dr. Voorhees voluntarily dismissed the Defamation
19 Lawsuit without prejudice, rendering any entry of default null and void. *See Minute Entry*,
20 Exhibit 1.

21 The facts and circumstances surrounding the entry of default in this case are very
22 similar to those in *Palaciosreal v. Indem. Co. of California, Inc.*, No.
23 CV1300993RGKDTBX, 2013 WL 12139138, at *4 (C.D. Cal. Oct. 21, 2013).² In
24 *Palaciosreal*, the plaintiff (who, unlike Davis, was an actual servicemember) brought an
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26

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28 ² A copy of the Decision and Order dismissing plaintiff’s SCRA claim has been attached
hereto as Exhibit 3.

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1 SCRA claim against the defendant for allegedly committing perjury by submitting an
2 SCRA affidavit prior to seeking an entry of default. In dismissing plaintiff’s SCRA, the
3 court held that, “[b]ecause Defendants never sought a default judgment against Plaintiff,
4 the SCRA affidavit requirement does not apply. Moreover, because Defendants were not
5 required to submit an affidavit, no independent claim based on the allegedly false affidavits
6 exists.” *Palaciosreal*, No. CV1300993RGKDTBX, 2013 WL 12139138, at *4; *see also*
7 *Davis v. Hunt Leibert Jacobson P.C.*, No. 3:12CV1102 (JBA), 2016 WL 2963418, at *8–9
8 (D. Conn. May 20, 2016) (“[T]he Court concludes that § 3931(b) contains no implied right
9 of action and thus Defendants’ motions to dismiss Plaintiff’s SCRA claim are granted.”).

10 For the same reasons, this Court should grant judgment in favor of Dr. Voorhees on
11 Davis’s SCRA. It is important to keep in mind that the SCRA “is not to be used as a sword
12 against persons with legitimate claims.” *Engstrom v. First Nat’l Bank of Eagle Lake*, 47
13 F.3d 1459, 1462 (5th Cir. 1995); *see also Lenser v. McGowan*, 358 Ark. 423, 431, 191
14 S.W.3d 506, 511 (Ark. 2004) (stating that “[t]he idea is to relieve servicemembers from
15 disadvantages arising from military service, not to provide advantages by reason of military
16 service”). Indeed, courts repeatedly have recognized that the SCRA creates only a limited
17 set of protections for servicemembers which cannot be expanded judicially. *See, e.g.*,
18 *Conroy v. Aniskoff*, 507 U.S. 511, 514, 113 S. Ct. 1562, 1564-65, 123 L. Ed. 2d 229 (1993)
19 (finding that the “statutory command in § 525 is unambiguous, unequivocal, and
20 unlimited” and that Respondents’ points did not “justify a departure from the unambiguous
21 statutory text”); *Bowlds v. Gen. Motors Mfg. Div. of General Motors Corp.*, 411 F.3d 808,
22 812 (7th Cir. 2005) (“However, even though these cases have implored courts to construe
23 certain veterans’ statutes liberally, they do not instruct courts to create rights out of whole
24 cloth.”); *Jimenez v. Miami-Dade Cty.*, No. 11-23131-Civ., 2013 WL 214673, at *3 (S.D.
25 Fla. Jan. 18, 2013) (“Although the Court must liberally construe the SCRA, extending §
26 531 to embrace the condemnation proceedings would require judicial legislation, which the
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1 Court cannot do.”); *Newton v. Bank of McKenney*, No. 3:11C 493-JAG, 2012 WL
2 1752407, at *6 (E.D. Va. May 16, 2012) (refusing to “rewrite” the SCRA to amend the
3 definition of “servicemember” to include closely-held corporation because “liberal
4 interpretation does not allow the [c]ourt to insert language that does not exist, or to ignore
5 language that does.”). Accordingly, the Court should grant judgment in favor of Dr.
6 Voorhees on Davis’s SCRA claim, which, as a matter of law, is incapable of being cured.

7 **IV. CONCLUSION**

8 Based on the foregoing, Dr. Voorhees respectfully requests that the Court enter
9 judgment dismissing with prejudice Davis’s SCRA claim.

10 **CERTIFICATION OF CONFERRAL**

11 Counsel for Dr. Voorhees conferred via telephone call with Davis’s counsel
12 regarding the relief requested in this Motion. The parties were unable to come to an
13 agreement that Davis’s SCRA claim was curable by any permissive amendment.
14

15 RESPECTFULLY SUBMITTED this 7th day of February, 2023.

16 **RM WARNER, PLC**

17
18 By: /s/ Daniel R. Warner, Esq
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the submission date referenced above, I caused the foregoing document to be electronically filed with the Clerk of the Court using CM/ECF. I further certify that a true and correct copy of the foregoing document is being served via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Allison Shilling
Allison Shilling, RM Warner, PLC employee

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